

Office of Chief Counsel
Internal Revenue Service
Memorandum

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to: Michelle M. Robles
Senior Attorney (Miami)
(Small Business/Self-Employed)

from: Blaise G. Dusenberry
Senior Technical Reviewer
(Procedure & Administration)

subject: I.R.C. 6721 Penalty for Missing or Incorrect TINs on Form W-2G or Form 1099-MISC

This Chief Counsel Advice responds to your request for assistance dated March 2, 2012. This advice may not be used or cited as precedent.

ISSUE

When a gaming establishment follows the procedures to solicit taxpayer identification numbers (TINs) from patrons to create Forms W-2G, *Certain Gambling Winnings*, under Treas. Reg. § 7.6041-1, if the TIN is later found to be incorrect, is the gaming establishment subject to the annual solicitation requirement of Treas. Reg. § 301.6724-1(f)?

CONCLUSION

Under the facts presented, the gaming establishment satisfies an exception to the requirement to make an annual solicitation under Treas. Reg. § 301.6724-1(f).

FACTS

Your inquiry is not case specific. Accordingly, we present a factual scenario that highlights your question:

For the 2006 taxable year, the taxpayer, a gaming establishment, prepared and filed numerous Forms W-2G pursuant to Treas. Reg. § 7.6041-1. Specifically, every time a

patron won \$1,200 or more from slot machine play, the gaming establishment would stop play (e.g., the slot machine would lock up, thereby not allowing further gaming), and prepare a Form W-2G containing: (1) the name, address, and employer identification number of the gaming establishment, (2) the name, address and TIN of the patron, (3) a general description of two types of identification (e.g., driver's license, social security card, voter registration card) furnished to the gaming establishment by the patron for verification of the patron's name, address and TIN, (4) the date and amount of the payment, and (5) the type of wagering transaction and identification number of the slot machine.

The Service examined the Forms W-2G and determined that a certain number of them contained incorrect TINs (and were not inconsequential errors). In 2008, the Service issued a notice proposing a penalty under section 6721 for taxable year 2006. In correspondence with the taxpayer, the Service requested that the taxpayer provide copies of the annual solicitations made in 2008 by the gaming establishment to the patrons for whom the gaming establishment submitted Forms W-2G with incorrect TINs. The gaming establishment filed a protest, claiming that it acted in a responsible manner for purposes of determining whether the penalty should be waived for reasonable cause.

LAW AND ANALYSIS

In the event of a failure to file an information return on or before the required filing date, the failure to include all of the information required to be shown on an information return or the inclusion of incorrect information on an information return, a taxpayer is subject to a penalty of \$100 for each return with a failure. I.R.C. § 6721. The penalty for all failures for a particular calendar year may not exceed \$1,500,000. I.R.C. § 6721(a). For purposes of section 6721, a statement of payments made to another person required to be filed under section 6041, such as a Form W-2G, *Certain Gambling Winnings*, is an information return. See I.R.C. § 6724(d); Treas. Reg. § 301.6721-1(g).

Section 6724(a) provides that a penalty under section 6721 may not be imposed if the failure is due to reasonable cause and not to willful neglect. A filer has reasonable cause if (1) either there are significant mitigating factors with respect to failure, or the failure arose from events beyond the filer's control, and (2) that the filer acted in a responsible manner. Treas. Reg. § 301.6724-1(a)(2). Significant mitigating factors include, but are not limited to, the fact that a filer has a history of compliance and whether the filer has incurred penalties in the past. Treas. Reg. § 301.6724-1(b). If a payee provides incorrect information upon which the filer relies in good faith, it may constitute an event beyond the filer's control. Treas. Reg. §§ 301.6724-1(c)(1), (c)(6). Acting in a responsible manner generally means that the filer exercised reasonable care and undertook significant steps to avoid or mitigate the failure. Treas. Reg. § 301.6724-1(d).

Where a filer seeks a waiver for reasonable cause on the basis that the actions of the payee or any other person caused the filer to include incorrect information on an information return, the filer will be deemed to have acted in a responsible manner if the filer makes an initial and annual solicitation upon the payee pursuant to Treas. Reg. § 301.6724-1(f). Treas. Reg. § 301.6724-1(d)(2).

The initial solicitation refers to the filer soliciting the payee's TIN at the time an account is opened, a relationship is started, or at the time of some other transaction requiring an information statement to be created. Treas. Reg. § 301.6724-1(f)(1)(i). If the Service notifies the filer that a TIN is incorrect, the filer generally must make an annual solicitation to obtain the correct TIN from the payee on or before December 31 of the year in which the filer is notified of the incorrect TIN (January 31 if the filer is notified of the incorrect TIN in the preceding December). Treas. Reg. § 301.6724-1(f)(1)(ii). A filer may have to perform a second annual solicitation, if notified in the following year that the account still contains an incorrect TIN.

The Treasury Regulations contain numerous exceptions to the requirement to perform an annual solicitation. One exception is, if the filer is required by an information reporting provision to follow specific requirements relating to the time and manner in which the TIN must be initially solicited from the payee, and the filer follows those provisions, the filer is not required to file an annual solicitation. Treas. Reg. § 301.6724-1(f)(5)(i). Additionally, if the filer makes no payments to an account in the year that the annual solicitation might be required to be made, the annual solicitation requirement does not apply. Treas. Reg. § 301.6724-1(f)(5)(ii).

In this case, both of the exceptions listed above potentially apply. Treasury Regulation section 7.6041-1 imposes specific requirements relating to when and how a gaming establishment must make and file a Form W-2G. Upon a slot machine jackpot of \$1,200 or more, the gaming establishment must solicit the patron's name, address, and social security number, and two forms of identification to verify the patron's name, address and social security number. See Treas. Reg. § 7.6041-1(c). These initial solicitation requirements are unique to slot machine winnings and must be followed with each reportable slot machine jackpot, regardless of whether multiple reportable slot machine jackpots occur in a short amount of time. Accordingly, because the gaming establishment follows the initial solicitation requirements of Treasury Regulation section 7.6041-1, the taxpayer will be deemed to have acted in a responsible manner.

Additionally, the second exception listed above could apply. The annual solicitation requirements generally apply when there is an account for the payee or an ongoing relationship between the filer and payee. In the case of gaming, it is arguable whether there is an ongoing account or relationship between a gaming establishment and a patron. Each transaction stands on its own as a separate and discrete transaction. The initial solicitation essentially occurs with each and every payment. It is probable, however, that a patron will patronize a gaming establishment multiple times over several years. If there is evidence that the gaming establishment made reportable payments to

the same patron in 2006 and in 2008 with the same or different incorrect TINs, the gaming establishment has an ongoing relationship with the patron and would not satisfy the exception under Treasury Regulation section 301.6724-1(f)(5)(ii).

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

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Please call 202-622-4940 if you have any further questions.